PEMUNYA KAPAL DAN ORANG-ORANG LAIN YANG MEMPUNYAI KEPENTINGAN DALAM KAPAL M.V. "BRIHOPE"

v.

EMMANUEL E. OKWUOSA & ORS. (NO. 1)

COURT OF APPEAL, KUALA LUMPUR
DATO' DR. ZAKARIA MOHD YATIM JCA
DATO' SHAIK DAUD MOHD. ISMAIL JCA
DATO' MAHADEV SHANKAR JCA
[CIVIL APPEAL MRRS. NO. P-02-369-94]
20 APRIL 1995

SHIPPING: *Admiralty in rem action - Claim by Crew of ship for unpaid wages - Summary judgment - Order for sale of ship - Whether properly granted.*

CIVIL PROCEDURE: *Admiralty - Claim against shipowners - Writ action in rem - Proper parties - Owners of ship and other persons interested in ship together named as defendants in writ - Whether constituted proper defendants - Whether contravened Form 155 Rules of the High Court 1980 - "Other persons interested in ship" - Whether could only intervene with leave of Court.*

CIVIL PROCEDURE: *Affidavits - Admiralty action in rem -Affidavit in reply - Delay in filing - Delay not explained - Whether perverse - Whether affidavit rightly rejected - Rules of the High Court 1980 O. 32 r. 13(2).*

JURISDICTION: *Admiralty jurisdiction of High Court - Courts of Judicature Act 1964 s. 24(b) - United Kingdom Supreme Court Act 1981 s. 20(1).*

The M.V. BRIHOPE is a cargo ship owned by Finego Enterprise Sdn. Bhd. (Finego). In 1991 the ship was mortgaged to Hong Leong Leasing Sdn. Bhd. (Hong Leong). In March 1994, the ship was arrested pursuant to *Admiralty in rem* action by the cargo owners. Subsequently, on 13 April 1994, Penang High Court *Admiralty in Rem* action No. 27-2-94 (the second action) was filed by the Master and Crew (the respondents) to recover from Finego unpaid wages amounting to RM468,300.

The facts showed that, although the second action was a claim against Finego, in their writ, the respondents did not cite Finego as defendant. Rather, the defendants named were "Pemunya Kapal dan orang-orang lain yang mempunyai kepentingan dalam Kapal M.V. BRIHOPE", i.e. "the owner and all other persons having an interest in the ship M.V. BRIHOPE". The writ was nonetheless duly served, and the cargo owners, Finego and Hong Leong, as a result, all had knowledge of the second action. Notwithstanding that,

however, only Finego had entered appearance which it did on 28 April 1994. Finego's Memorandum of Appearance, following the writ's title, likewise stated "masukkan kehadiran untuk Pemunya Kapal dan orang-orang lain yang mempunyai kepentingan dalam Kapal M.V. BRIHOPE". No appearance was thus entered by Finego for its own behalf.

On 6 May 1994, the respondents applied for summary judgment, and for an order that the ship be sold off to settle the claim. The application was supported by an affidavit affirmed by the Master. This affidavit fully complied with O. 14 r. 2(1) Rules of the High Court 1980. Again, only Finego responded to the application and proceeded to file affidavit in reply (Eng's affidavit) to challenge the claim. Eng's affidavit, however, was only filed on 6 June 1994 i.e. thirty days after the application for summary judgment, one day before the scheduled hearing (fixed for 7 June 1994), and in any case more than 14 days after Finego had been served with the said Master's affidavit.

On 7 June 1994, Azmel J. disallowed Eng's affidavit and consequently granted summary judgment as prayed. Hong Leong then decided to intervene and, having obtained the necessary leave, entered appearance on 22 June 1994. Thereafter Finego filed an application for stay while Hong Leong filed a summons-in-chambers to set aside Azmil J.'s judgment. The two applications were heard *inter-partes* and on 12 August 1994 both applications were dismissed by Azmil J. Finego and Hong Leong have now appealed.

Before the learned Judges, in respect of Finego's appeal, the following issues *inter alia* arose for consideration:

(i) whether the parties named as defendants in the writ to the second action constituted the proper defendants thereto.

(ii) whether, notwithstanding the writ's title, and Finego's Memorandum of Appearance, Finego had in reality entered appearance for its own behalf.

(iii) whether Eng's affidavit was rightly rejected by the learned Judge.

(iv) whether, on the strength of their pleadings alone, the respondents were entitled to succeed in their application for summary judgment.

Held:

Per Mahadev Shankar JCA (delivering the judgment of the Court):

[1] The Admiralty jurisdiction of the High Court is provided by s. 24(b) of Courts of Judicature Act 1964 whereby the Court has "the same jurisdiction and authority in relation to matters of Admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981".

[2] The title to the second action (by the respondents) is wrong as it does not follow the prescribed Form 155 Rules of the High Court 1980. It is wrong for the "defendants" to be described as "the owners and other persons having an interest in the ship M.V. Brihope". As it is, only the owners of the BRIHOPE and those legally liable for the plaintiffs' claims enter appearance as of right, and should have been described as defendants. "Persons interested in the ship", while forming part of the citation to whom the writ is addressed, must obtain leave to intervene and would only appear as interveners.

[3] Finego's solicitors should not have entered appearance by following the way the title to the action was worded. By entering appearance the way they did, Finego's solicitors left it to speculation whether in holding themselves out as "the defendants" solicitors, they were acting not just for Finego but also for Hong Leong as well. What they had to state if they were acting for Finego was that they were entering appearance for Finego Enterprise Sdn. Bhd.

[4] However, since by law only the owners can enter appearance as of right, the Court must treat the appearance as being entered on behalf of Finego and the appellant as being Finego only, notwithstanding the way the appellant has been described here. Also, it has to be so as Hong Leong was separately represented.

[5] Order 32 r. 13(2) of the Rules of the High Court 1980 is mandatory in nature. Bearing this in mind, and the fact that the statement of claim was served on 13 April 1994, Eng's affidavit was rightly rejected by the learned Judge. On the facts, there was not a word in Eng's affidavit which sought to explain the delay. The delay was therefore perverse. Finego could have applied for extension or abridgment of time under O. 3 r. 5 of the RHC but that had not been done.

[6] Finego had chosen to conduct its case in the Court below and before this Court in a manner which made judgment against them inevitable. Even though the quantum of the claim of the respondents, and particularly of the Master, was so large as to raise one's eyebrows, the Master had verified the totals claimed as required by O. 14 r. 2 in Form 18. If Finego had wished to mount a serious challenge, they could and ought to have done so as soon as they were served with the statement of claim. They could have applied for further and better particulars and could also have filed their own accounts. They did nothing till the afternoon of the trial, and even that, the material they produced was most unconvincing. The learned Judge was therefore left with no option but to give judgment as he did on the materials presented to him.

[Appeal dismissed]

***[Bahasa Malaysia** Translation of Headnotes]*

***PERKAPALAN:** Tindakan admiralti in rem - Tuntutan oleh krew kapal bagi gaji yang tidak dibayar - Penghakiman terus - Perintah untuk penjualan kapal - Samada telah diberikan dengan wajar.*

***PROSEDUR SIVIL:** Admiralti - Tuntutan terhadap pemilik-pemilik kapal - Tuntutan writ in rem - Pihak-pihak yang wajar - Pemilik-pemilik kapal dan orang-orang lain yang berkepentingan dalam kapal sekaligus dinamakan sebagai defendan-defendan dalam writ - Samada merupakan defendan-defendan yang betul - Samada melanggari Borang 155 Kaedah-kaedah Mahkamah Tinggi 1980 - "Orang-orang lain yang mempunyai kepentingan dalam kapal" - Samada hanya boleh mencelah dengan kebenaran Mahkamah.*

***PROSEDUR SIVIL:** Afidavit - Tindakan Admiralti in rem - Afidavit jawapan - Kelewatan pemfailan - Kelewatan tidak dijelaskan - Samada salah - Samada afidavit ditolak dengan betulnya - Kaedah-kaedah Mahkamah Tinggi 1980 A. 32 k. 13(2).*

***BIDANGKUASA:** Bidangkuasa Admiralti Mahkamah Tinggi - Akta Mahkamah Kehakiman 1964 s. 24(b) - Akta Mahkamah Agung United Kingdom 1981 s. 20(1).*

M.V. Brihope adalah sebuah kapal kargo yang dimiliki oleh Finego Enterprise Sdn. Bhd. (Finego). Dalam tahun 1991 kapal tersebut telah digadaijanjikan kepada Hong Leong Leasing Sdn. Bhd. (Hong Leong). Dalam bulan Mac 1994, kapal tersebut telah ditahan selaras dengan tindakan admiralti *in rem* oleh pemilik-pemilik kargo. Berikutan itu, pada 13 April 1994, tindakan admiralti *in rem* No. 27-2-94 Mahkamah Tinggi Pulau Pinang (tindakan kedua) telah difailkan oleh Nakhoda dan kelasi-kelasi (responden) untuk mendapatkan semula daripada Finego gaji yang tidak dibayar berjumlah sebanyak RM468,300.

Fakta kes menunjukkan bahawa, walaupun tindakan kedua ini adalah tuntutan terhadap Finego, dalam writ mereka, responden tidak menyebut Finego sebagai defendan. Sebaliknya, defendan yang dinamakan adalah "Pemunya Kapal dan Orang-orang lain yang mempunyai kepentingan dalam kapal M.V. Brihope". Writ tersebut bagaimanapun telah disampaikan, dan pemilik-pemilik kargo, Finego dan Hong Leong, dengan itu, kesemuanya mengetahui mengenai tindakan kedua ini. Walaupun begitu, hanya Finego memasukkan kehadiran yang mana telah dilakukan pada 28 April 1994. Dan selaras dengan tajuk writ, Memorandum Kehadiran Finego juga menyatakan "masukkan kehadiran untuk Pemunya Kapal dan orang-orang lain yang mempunyai kepentingan dalam Kapal M.V. Brihope". Tiada kehadiran telah dengan itu dimasukkan oleh Finego bagi pihak dirinya sendiri.

Pada 6 Mei 1994, responden telah memohon untuk mendapatkan penghakiman terus, dan untuk perintah supaya kapal tersebut dijual bagi menjelaskan tuntutan mereka. Permohonan ini telah disokong oleh satu afidavit yang diikrarkan oleh Nakhoda. Afidavit ini mematuhi sepenuhnya A. 14 k. 2(1) Kaedah-kaedahmahkamah Tinggi 1980. Sekali lagi, hanya Finego menjawab permohonan tersebut dan memfailkan afidavit jawapan (afidavit Eng) bagi mencabar tuntutan itu. Afidavit Eng, walaubagaimanapun, telah difailkan hanya pada 6 Jun 1994, iaitu tiga puluh hari selepas permohonan untuk penghakiman terus tersebut, satu hari sebelum pembicaraan yang dijadualkan (yang telah ditetapkan pada 7 Jun 1994), dan walau apa pun lebih daripada 14 hari selepas Finego disampaikan dengan afidavit Nakhoda tersebut.

Pada 7 Jun 1994, Azmel H telah tidak membenarkan afidavit Eng dan akibatnya telah memberikan penghakiman terus sepertimana yang dipohon. Hong Leong kemudiannya membuat keputusan untuk mencelah dan, setelah mendapat kebenaran yang perlu, telah memasukkan kehadiran pada 22 Jun 1994. Selepas itu Finego telah memfailkan satu permohonan untuk penggantungan sementara Hong Leong pula memfailkan saman dalam kamar untuk mengenepikan penghakiman Azmil H. Kedua-dua permohonan tersebut telah didengar secara *inter partes* dan pada 12 Ogos 1994 kedua-dua permohonan itu telah ditolak oleh Azmil H. Finego dan Hong Leong kini telah merayu.

Di hadapan Hakim-Hakim rayuan yang bijaksana di sini, berkaitan dengan rayuan Finego, isu-isu berikut antara lain telah berbangkit untuk pertimbangan:

(i) samada pihak-pihak yang dinamakan sebagai defendan dalam writ kepada tindakan kedua merupakan pihak-pihak yang sepatutnya menjadi defendan.

(ii) samada, sekalipun dengan mengambil kira tajuk writ dan Memorandum Kehadiran Finego, Finego sebenarnya telah memasukkan kehadiran bagi pihak diri mereka sendiri.

(iii) samada afidavit Eng telah ditolak dengan betulnya.

(iv) samada, berdasarkan hanya kepada keteguhan pliding mereka, responden berhak untuk berjaya dalam permohonan mereka untuk penghakiman terus.

Diputuskan:

Oleh Mahadev Shankar HMR (menyampaikan penghakiman Mahkamah):

[1] Bidangkuasa Admiralti Mahkamah Tinggi diperuntukkan oleh s. 24(b) Akta Mahkamah Kehakiman 1964 di mana Mahkamah mempunyai "bidangkuasa dan kuasa yang sama sehubungan dengan perkara-perkara Admiralti

sepertimana yang dimilikinya oleh High Court of Justice di England di bawah the United Kingdom Supreme Court Act 1981".

[2] Tajuk kepada tindakan kedua (oleh responden) adalah salah kerana ianya tidak menuruti Borang 15 Kaedah-kaedah Mahkamah Tinggi 1980 yang telah ditetapkan. Ianya salah bagi "defendan-defendan" disebutkan sebagai "tuanpunya dan orang-orang lain yang mempunyai kepentingan dalam kapal M.V. Brihope". Sepertimana keadaannya, hanya tuanpunya BRIHOPE dan mereka yang bertanggungan secara sah di sisi undang-undang bagi tuntutan plaintif boleh memasukkan kehadiran menurut hak, dan seharusnya disebut sebagai defendan-defendan. "Orang-orang yang mempunyai kepentingan dalam kapal tersebut", sementara membentuk sebahagian daripada nama kepada siapa writ dialamatkan, mestilah mendapatkan kebenaran untuk mencelah dan akan hanya hadir sebagai pencelah sahaja.

[3] Peguamcara Finego seharusnya tidak memasukkan kehadiran menurut cara tajuk tindakan tersebut disusun. Dengan memasukkan kehadiran sepertimana yang telah dilakukannya Peguamcara Finego mendedahkan kepada spekulasi samada dalam mengemukakan diri mereka sebagai peguamcara "defendan-defendan", mereka bukan sahaja mewakili Finego tetapi juga mewakili Hong Leong. Apa yang mereka seharusnya nyatakan jika mereka bertindak bagi pihak Finego adalah bahawa mereka memasukkan kehadiran bagi pihak Finego Enterprise Sdn. Bhd.

[4] Walaubagaimanapun, oleh kerana menurut undang-undang hanya tuanpunya boleh memasukkan kehadiran menurut hak, Mahkamah mesti menganggapkan kehadiran yang dimasukkan sebagai dimasukkan semata-mata bagi pihak Finego dan perayu sebagai Finego sahaja, walaupun menyedari tentang cara bagaimana perayu tersebut disebut di sini. Ianya seharusnya sedemikian kerana Hong Leong telah diwakili secara berasingan.

[5] Aturan 32 k. 13(2) Kaedah-kaedah Mahkamah Tinggi 1980 adalah mandatori menurut sifatnya. Memikirkan perkara ini, dan hakikat bahawa pernyataan tuntutan telah disampaikan pada 13 April 1994, afidavit Eng telah ditolak dengan sahnya oleh Hakim yang bijaksana. Berdasarkan fakta-fakta tersebut, tidak terdapat satu perkataan pun dalam afidavit Eng yang cuba menerangkan kelewatan. Kelewatan itu adalah dengan itu menjadi sesuatu yang salah. Finego boleh memohon untuk perlanjutan masa atau penyingkatan masa di bawah A. 3 k. 5 KMT tetapi perkara ini telah tidak dilakukan.

[6] Finego telah memilih untuk mengendalikan kesnya dalam Mahkamah di bawah dan di hadapan Mahkamah ini menurut cara yang menjadikan penghakiman terhadap mereka tidak dapat dielakkan. Walaupun kuantum tuntutan responden-responden dan khususnya Nakhoda adalah terlalu besar sehingga memeranjatkan sesiapa pun, Nakhoda telah menentusahkan jumlah-jumlah yang dituntut sepertimana yang dikehendaki di bawah A. 14 k. 2

dalam Borang 18. Jika Finego ingin untuk memulakan cabaran yang serius, mereka boleh dan seharusnya melakukan sedemikian sebaik sahaja mereka disampaikan dengan pernyataan tuntutan tersebut. Mereka seharusnya memohon untuk mendapatkan butir-butir yang selanjutnya dan yang lebih baik dan boleh juga memfailkan akaun-akaun mereka sendiri. Mereka tidak melakukan apa-apa sehingga waktu tengahari pada hari perbicaraan tersebut, dan itu pun, bahan yang mereka kemukakan sesungguhnya amat tidak menyakinkan. Hakim yang bijaksana dengan itu tidak mempunyai apa-apa pilihan melainkan memberikan penghakiman sepertimana yang dilakukan olehnya berdasarkan bahan-bahan yang dikemukakan kepada beliau.

[Rayuan ditolak]

Cases referred to:
Malayan Banking Bhd. v. Siong Electronic Industries Sdn. Bhd. & Others [1994] 1 MLJ 704 ***(refd)***
Soeraya Emas [1992] 1 SCR 33 ***(refd)***
Re Aro Co. Ltd. [1979] 1 Ch. 613 ***(cit)***
The Bolbina [1994] 1 SCR 554 ***(cit)***

Legislation referred to:
Courts of Judicature Act 1964, s. 24(b)
Merchant Shipping Ordinance 1952, ss. 99, 119
Rules of the High Court, O. 3 r. 5, O. 14 r. 2(1), O. 32 r. 13, O. 70 rr. 10, 20(7)
Supreme Court Act 1981 (U.K), s. 20(1)

For the respondents - Bernard Kok; M/s. Ban Eng, Anual & Foong
For the defendants - Surinder Singh; M/s. Lee Hishamuddin

JUDGMENT

Mahadev Shankar JCA:

The 26 respondents in this appeal are the Master and Crew of the M.V. BRIHOPE (the ship) which was owned by the appellant Finego Enterprise Sdn. Bhd. (Finego). The ship was the subject of two mortgages to Hong Leong Leasing Sdn. Bhd. (Hong Leong). She was registered in the Port of Penang on 21 October 1992. We heard this appeal together with two other appeals (P. 02-69-94 and P. 02-332-94) and dismissed each of them with costs. These respondents are also the respondents in the other two appeals. The subject matter is the same. Our reasons for dismissing this appeal now follows.

In March 1994 the ship arrived in Penang with cargo belonging to Messrs. Lam Guan Chuan Sdn. Bhd. (Lam Guan). After arrival in Penang Lam Guan had problems with their cargo. So they filed Penang High Court Admiralty *in Rem* Action 27-1-94 (the first action) and arrested the ship on 26 March 1994. Thereafter the cargo was unloaded under the direction of the Sheriff. On 30 March 1994 the ship's Master And Crew aforesaid (collectively referred

to as the Crew) filed a caveat against the release of the ship and also against payment out of Court of the proceeds of the sale thereof if so ordered.

On 13 April 1994 the Crew commenced Penang High Court Admiralty in *Rem* Action No. 27-2-94 (the second action) to effect recovery of the wages and disbursements they claimed were due to them. The defendants named were "Pemunya Kapal dan orang-orang lain yang mempunyai kepentingan dalam Kapal M.V. "BRIHOPE" (or in English 'the owner and all other persons having an interest in the ship M.V. "BRIHOPE"').

Their statement of claim averred that their wages and disbursements as recorded in the Crew's monthly wages account and due to them by the shipowners came to an alleged total of RM468,300 as at 31 March 1994. The arrest of the ship in the first action was referred to. The judgment prayed for was:

(a) in respect of the amount claimed as wages due to them;

(b) a reference to the S.A.R. to assess the amount due to each of them;

(c) interests, cost and such other relief as may be just.

Service of the writ was affected as provided by O. 70 r. 10. On 28 April 1994 Finego's solicitors entered appearance but the form of the Memorandum of Appearance used did not state that appearance was being entered for Finego Enterprise Sdn. Bhd. but stated 'Masukkan kehadiran untuk Pemunya Kapal dan orang-orang lain yang mempunyai kepentingan dalam Kapal M.V. "BRIHOPE"'.

On 6 May 1994 the Crew filed O. 14 application for summary judgment in the second action for the amount claimed, interest thereon and for an order that the ship be sold by public auction or private treaty to settle the plaintiff's claims. This application was supported by an affidavit affirmed by the Master on 4 May 1994, for himself and his Crew. This affidavit is in Form 18 of the Rules of the High Court (RHC). It stated that the defendants were justly and truly indebted to them for RM468,300 as wages and allowances. By way of particulars the Master annexed copies of the agreement and account of the Crew made pursuant to s. 99 of the Merchant Shipping Ordinance 1952 and the Crew's Monthly Wages Account. He again referred to the arrest of the ship in the first action, and the failure of the defendants to provide them food and necessaries. And he averred that he believed there was no defence to the action. In short the form of this affidavit, complied with O. 14 r. 2(1) of the RHC. The application was fixed for hearing on 13 May 1994. It was adjourned at the instance of defendants' solicitors (on grounds of short service) to 7 June 1994. On the same day i.e. 13 May 1994 Lam Guan's solicitors sent a letter by A.R. Registered to Hong Leong giving notice of the commencement of the first action; the arrest of the vessel; the proposed

application for an order of sale and requested Hong Leong to state their interests. Hong Leong's reply to this letter is not before us.

By P.U.(A) 192/93 on the 1 August 1993 O. 32 r. 13 of the RHC was amended by the addition of a new sub-rule (2) which made it mandatory for a party who was served with an affidavit in support of an application, to file and serve his affidavit in reply within 14 days of the service of the affidavit in support of the application. Finego's solicitors did not comply with this rule. On 6 June 1994 a Director of Finego by name of Eng Keng Ho (Eng) affirmed an affidavit in reply challenging the claim of the plaintiffs. It was filed and served the same day, but at the hearing the next day, plaintiffs' Counsel objected to its admissibility. Y.A. Dato' Azmel refused to allow it to be used.

After reading the other cause papers and hearing the submissions of Encik Bernard Kok for the Master and Crew and Mr. Surinder Singh Gill of Counsel for defendants Y.A. Dato' Azmel made an order in terms of the application.

The shipowners applied on 8 June 1994 for further argument. On 17 June Y.A. Dato' Azmel certified he did not require further argument. Finego then filed their Notice of Appeal to the Supreme Court (now the Federal Court) on 24 June 1994. The appeal was registered as P. 02-359-1994 (the first appeal).

In essence Eng's affidavit was a challenge to the quantum of the plaintiffs' claim. He claimed that plaintiffs 6, 14 and 20 had already left the ship for their home countries and the Master could not speak for them. Eng also supplied his own accounts to show that the total Crew claims for wages till March 1994 should amount only to RM61,019.05 (and not RM468,300 as claimed by the plaintiffs). When Finego was aware of this claim at least as early as 28 April 1994 there is no explanation as to why they waited till 6 June 1994 to file their affidavit.

By about 15 May Hong Leong should have received the letter of the cargo owner's solicitors and were therefore aware of Admiralty *in rem* No. 1 of 1994. It follows that about the same day they ought to have been aware that Admiralty *in rem* No. 2 of 1994 had been filed. Hong Leong were content to let Finego take care of the litigation and instructed its own solicitor to hold a watching brief in the second action which he did by being present in Court on 7 June. It is only after summary judgment was given on that day that Hong Leong decided to intervene. They applied *ex parte* on 17 June, got their order and entered appearance on 22 June 1994.

After filing its appeal to the Supreme Court Finego filed an application (Encl. 18) to the High Court on 1 July 1994 to stay execution of the summary judgment pending their appeal. Hong Leong filed a summons-in-chambers on 7 July 1994 to set aside the summary judgment (Encl. 22). Both applications were heard *inter partes* and dismissed by Y.A. Dato' Azmel on 12 August

1994. By this time the appellate Courts had been reconstituted by the creation of the Court of Appeal. Finego's appeal to the Supreme Court remained alive as an appeal to the Federal Court. Hong Leong filed an appeal in the Court of Appeal on 19 August 1994 listed as P.02-69-94 (the second appeal). (In effect there were two appeals to different Courts against the same judgment!). Nothwithstanding the first arrest by the cargo owners in Admiralty *in rem* 27-1-94, the ship was arrested again on 16 August 1994 in Admiralty *in rem* 27-2-94 by the Crew. Only then did the Sheriff apply for directions and on 2 September 1994 the Judge approved the condition of sale. Hong Leong participated in this exercise. The ship broker suggested by them was appointed to assist the Sheriff and Hong Leong also volunteered to repatriate the crews, an offer the Crew declined.

The appraisement was completed on 6 September and the warrant of arrest in this action (i.e. Encl. 26) was executed on 8 September 1994. As the first tender was not acceptable to Hong Leong, they applied to the Judge for a second tender and obtained an order to that effect on 22 September 1994 on condition that they maintain the ship thereafter.

On 3 October 1994 the cargo owners released their arrest of the ship in Admiralty *in rem* 27-1-94 but filed a caveat in 27-2-94 against the release and payment out of the funds.

The second tender was accepted by the end of October and the Sheriff was in possession of the funds by 5 November 1994. The ship was released to the buyer on 24 November 1994. The contest for the distribution of the funds then began.

That same say Finego filed a caveat against the release of the funds whilst the Crew filed a Motion (Encl. 69) that day for determination of priority and payment out of the proceeds of sale supported by the Master's affidavit sworn on l December 1994 (Encl. 73). The Crew also filed a Notice for Assessment of Damages (Encl. 67).

On 2 December 1994 Finego filed an application in the Federal Court for stay of distribution. This was fixed for hearing on 3 January 1995. On 3 December 1994 Hong Leong filed a summons-in-chambers (Encl. 75) in the High Court for a stay of distribution also. Both Encl. 69 and Encl. 75 came on for disposal Y.A. Vincent Ng on 12 December 1994, and he dismissed the application for stay (Encl. 75) and certififed the priority distribution (Encl. 69). Against this Hong Leong filed an appeal in the Court of Appeal on 19 December 1994 (the third appeal). It in listed as P.02-332-94.

In the Federal Court Finego obtained an interim stay of distribution on 19 December 1994, pending hearing of their application proper which was heard on 3 January 1995. That day the Federal Court ordered by consent that the sum of RM61,019.05 admitted by Finego to be due to the Crew be paid

out of the funds held by the Sheriff be paid out to the Master and Crew towards account of their claim for wages. The balance was to be retained pending the result of the appeal.

The subject matter of the first and second appeals and the objective of Finego and Hong Leong were identical i.e. to reverse the order made by Y.A. Dato' Azmel on 7 June 1994. At our invitation the parties agreed to apply for and obtained an order by consent for the first appeal to be transferred by the Federal Court where it was relisted as P.02-369-1994.

When the three appeals came before us the solicitors for Finego were permitted to withdraw. Finego was absent even though they had received prior notice from their solicitors to be present. The respondents' Counsel requested us to dismiss the first appeal and we did so with costs to be taxed and the deposit to be paid out towards account.

We wish to record here our appreciation to Counsel for the painstaking way in which they covered the ground in these appeals. In view of the grey areas they exposed, it is desirable to restate some basic principles applicable to Admiralty law and practice.

The Admiralty jurisdiction of the High Court is provided by s. 24(b) of the Courts of Judicature Act 1964 whereby the Court has:

> (b) the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981.

The United Kingdom Supreme Court Act 1981 can be found in any edition of the White Book after that date. Section 20(1) of the Act states *inter alia*, that the Admiralty jurisdiction of the High Court shall be as follows, that is to say:

> (a) jurisdiction to hear and determine any of the questions and claims in sub-section (2), of which the relevant portions are:
>
> (g) any claim for loss or damage to goods carried in a ship;
>
> (o) any claim by a master or member of a crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages;
>
> (p) any claim by a master, in respect of disbursements made on account of a ship.

We are not called upon to say anything about the merits of the first action by the cargo owners. We need to emphasise however that when the ship was arrested she went into the possession of the Sheriff (Admiralty Marshal) of the Penang High Court, [see *Re Aro Co. Ltd.* [1979] 1 Ch. 613 at p. 617 (Folld. in '*The Bolbina*' [1994] 1 SCR 554 at 559H by Selvam JC)].

The effect of the caveat of the Crew in the first action was to prevent the release of ship and payment out of proceeds of its sale without the consent of the caveator or order of Court.

In SCP 1991 para 75/14/1 there appears this passage:

> Use of the caveat procedure normally makes it unnecessary for a plaintiff in an action in rem against property which is under arrest in another action to issue a warrant for the arrest of that property.

The title to the second action calls for adverse comment because the solicitors of the Master and Crew described "the defendants" as "the owners **and** other persons having an interest in the ship M.V. BRIHOPE" This is wrong because it does not follow the prescribed form (see Form 155 of the Rules of the High Court 1980). The corresponding form in the SCP 1993 is Form 1 Vol. 2 para 1301, and Atkins Court Forms Second Edition Vol. 3 (1990 issue) at p. 137. Only the owners of the BRIHOPE (and/or those legally liable for the plaintiffs' claims) should have been described as defendants. "Persons interested in the ship" should form part of the citation to whom the writ is addressed. The ship's owners (and those legally liable for the plaintiffs' claims) enter appearance as of right. Persons interested must obtain leave to intervene and after obtaining leave appear as interveners. [I am indebted to justice Selvam (as he now is) for this exposition which appears in *The Bolbina (Ibid)* at p. 556]. See also *The Soeraya Emas* [1992] 1 SCR 33 at p. 36H where Karthigesu J deals with the same point.

Finego's solicitors did not seem to appreciate that they should not have entered appearance by following the way the title to the action was worded with the result that it could be left to speculation whether in holding themselves out as "the defendants" solicitors they were acting not just for Finego but also in some indirect way to protect the interests of Hong Leong as well. What they had to state if they were only acting for Finego was that they were entering appearance for Finego Enterprise Sdn. Bhd. (see SCP 1991 Vol. 2, p. 354).

The first Mortgage Deed executed by Finego in favour of Hong Leong was dated l June 1991 and the second on 2 October 1992. Article 5.01(o) required Finego duly and punctually to pay the wages of the Master and crew and furnish evidence thereof to Hong Leong. Article 5.01(e) required Finego to notify Hong Leong promptly in the event of arrest and legal process. Article 6.01 enabled Hong Leong to exercise all its remedies in the event of default or if the security was in jeopardy. Article 6.04 conferred a general power of attorney in favour of Hong Leong and by 6.04(h) Hong Leong was specifically empowered to appear in any Court and conduct pending legal proceedings in the name of Finego. It is therefore manifestly obvious that if they were minded to Hong Leong could have **defended** both the first and the second actions form the inception but chose not to do so.

Indeed when the matter first came up for hearing on 13 May 1994, the defendants were represented by T.M.L. Lee who requested a postponement. On 7 June 1994 Mr. Surinder Singh of Messrs. Ong and Manecksha appeared for the Finego and Mr. Felix Dorairaj of Nahappan, Dorairaj & Danker appeared for Hong Leong. The cargo owners' solicitors were also present by Counsel Cik Christina Siew.

It is a curious situation we have here because the Court's Notes of Evidence do not indicate that at any time the defendant's solicitors specifically stated that they were acting for Finego. Indeed Eng's affidavit of 6 June 1994 does not specifically state Finego's name. It has to be implied from this affidavit that "the defendants" solicitors were acting for the ship owners alone (and therefore only for Finego), since Hong Leong was separately represented. Since by law only the owners could enter appearance as of right, we are treating the appearance entered and the appellants as being Finego only (albeit with Hong Leong's blessings) notwithstanding the way the appellant has been described here.

What happended on 7 June 1994 at the hearing calls for analysis along the following lines:

(i) Was Eng's affidavit rightly rejected by the Judge;

(iii) Were the Master and Crew entitled to succeed in their application on the strength of their pleadings alone.

When an O. 14 application complies with the formal requirements of the Rules, the onus is upon the defendant to show cause why he should be given leave to defend.

Order 32 r. 13(2) of the Rules of the High Court 1989 was specifically enacted to eradicate the rampant abuse of process by malevolent indolent or unpaid practitioners who had devised a fail-safe method of causing unwarranted delays by filing affidavits at the last minute. The rule is mandatory. Of course the Court always has a discretionary power to extend time (see Courts of Judicature Act 1964 - Article of the Schedule - and O. 3 r. 5 of the RHC 1980). But very powerful reasons must be advanced and the application for an extension should preferably be filed before time expired. (In this case on 13 May or well before 7 June).

In the present case there was not one word in Eng's affidavit why the delay had occurred and in the circumstances of this case that delay was perverse. Even assuming that all Finego owed the Master and Crew was RM61,019.05 what excuse was there for keeping them incarcerated on the ship indefinitely until the Court forced payment?

In applying for Eng's affidavit to be rejected, Mr. Bernard Kok of Counsel for the plaintiffs cited *Malayan Banking Bhd. v. Siong Electronic Industries Sdn. Bhd. and Others* [1994] 1 MLJ 704. It was there held that O. 32 r. 13 applies retrospectively, that affidavits filed after the 14-day period will not be received and that a formal application for extension or abridgement of time under O. 3 r. 5 of the RHC had to be filed before the Court would consider the matter. There was no such application here by the shipowners.

In response the shipowners' Counsel said he had difficulty in contacting his client in Singapore, Colombo and India and time was taken to obtain the vouchers. It is not for Counsel to give evidence for his client from the Bar Table. The statement of claim which contained details of the wages and disbursements was served on 13 April 1994, and we agree it was a lame excuse to say the shipowners only started to collect their material for Eng's affidavit after service of the O. 14 application. Eng's affidavit was rightly rejected by the trial Judge.

As a consequence the shipowners' Counsel was left to attack the plaintiffs' case by relying on its alleged inherent vices. He submitted that the details of the plaintiffs' claim contained many irregularities but did not specify what those irregularities were. He also referred to s. 119 of the Merchant Shipping Ordinance and contended that the Master of the ship did not have a blanket agency to put up the accounts for the wages of the Crew.

The evidence in support of the claim of the Crew was contained in the Master's affidavit which exhibited two documents both of which were prepared pursuant to a statutory obligation. The first document an "Agreement and Account of Crew" was made as provided by s. 99 of the Merchant Shipping Ordinance 1952. Section 98 of this Ordinance requires the Master to enter into such an agreement, and s. 99 provides the form of the agreement. This was dated 30 October 1993 and filed at the Penang Port Office for a voyage commencing on 1 November 1993. It contained details of the quantum of wages agreed to be paid to each of the persons employed on board. The second document came from a Register for Crew's Monthly Wages Account. This is also a statutory requirement because by s. 119 of the Ordinance this account had to be delivered to the Port Officer when the seamen left the ship and payment of wages (by s. 118) had to be made in the presence of the Port Officer. The Master had prepared these document himself and the Crew's Monthly wage account was made up to 31 March 1994.

By way of example the Master's monthly wages according to the agreement was M$9,000 and the last balance claimed was RM213,102. (Appeal Record p. 82). These documents by themselves are not self-explanatory and not easy to understand. The master's monthly salary at M$9,000 per month for the five months from March 1993 to 31 March 1994 should be RM45,000. How the claim became RM213,102 is not fully explained. The claim for San Win Aung

was RM32,559,23. His month salary was $2,277 and for 5 months is $11,385. Apparently he was due to be paid $26,416.05 at the close of his articles on 31 October 1993 before he began new articles on l November 1993 for this voyage. There are various deductions which could explain the final figure.

No point would be served here in going through all the accounts in detail for each seaman. Suffice to say that if the shipowners wished to mount a serious challenge they could and ought to have done so as soon as they were served with the Statement of Claim. They could have applied for further and better particulars immediately. They could have filed their own accounts. They did nothing till the afternoon before the trial, and the material Finego produced, even if it had been admitted was most unconvincing.

In the result even though the quantum of the claim of the plaintiffs and particularly the Master was so large as to raise one's eyebrows, the Master had verified the totals claimed as required by O. 14 r. 2 in Form 18.

For the benefit of other solicitors who may hereafter find themselves in these waters we think it appropriate to observe that this application was not an application for a default judgment under O. 70 r. 20 where by r. 20(7), notwithstanding the applicant's affidavit, the Court must be satisfied that the applicant's claim is well founded before it can give judgment for the claim with or without reference to the Registrar. In the *Soeraya Emas* [1992] 1 SLR 33 at p. 44 Karthigesu J sought to extend these provisions to an O. 14 application but we must point out that the application before him was one which was **uncontested**. In that sense the defendant there had allowed the judgment against him to go by default.

In the present case, Finego contested the application. It may be that Finego's solicitors were required by their client to make bricks with straw. The fact remains that Y.A. Dato' Azmel had no option but to give judgment as he did on the materials presented to him.

Before us Counsel for the Master and Crew said in passing that the figures claimed were so large because as each set of articles expired, the amounts previously due were carried forward and the old documents were no longer available. Whatever this may mean, the end result is that Finego chose to conduct its case in the Court below and before us in a manner which made judgment against them inevitable. We therefore dismissed the first appeal.

Reported by W.A. Sharif